CLERK'S COPY

[redacted]

No. [redacted]

[redacted]

[redacted] SOMERS, AUDITOR OF PUBLIC ACCOUNTS AND EX-OFFICIO [redacted] COLLECTOR, APPELLANT,

vs.

[redacted] G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

FILED AUGUST 4, 1913.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR, APPELLANT,

vs.

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

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IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

MINUTES OF THE COURT

Shreveport, Louisiana,
Monday, Sept. 21st, 1942.

STATE OF LOUISIANA,
Parish of Caddo:

Be It Remembered: That the regular civil term of the First Judicial District Court of the State of Louisiana, in and for the Parish of Caddo was regularly convened and held at the Court House in the City of Shreveport, Caddo Parish, Louisiana, on Monday, Sept. 21st, 1942, at ten o'clock A. M.

Their Honors Judges E. P. Mills; John R. Pleasant; J. H. Stephens and Robt. J. O'Neal, presiding.

Victor G. Simmons, Clerk of Court, represented by H. L. Booth; S. O. Williams; Dan W. Collins and E. W. Goetz, Jr., Deputy Clerks.

J. Howell Flournoy, Sheriff, represented by Joe Bradley; John Currie and Julian Carter, Deputy Sheriffs.

The minutes of the Court for Wednesday, July 15th, 1942, and the minutes of the entire summer were read and approved in open Court.

Shreveport, Louisiana,
Tuesday, March 2, 1943.

Court met pursuant to adjournment.

Their Honors, Judges McClendon and O'Neal, presiding.

The minutes of yesterday were read and approved in open Court.

86,893

Succn. of Sam Wiener, Jr.: Regularly taken up for trial on Rule to Show Cause. Answer filed by defendant in rule. Plea of unconstitutionality filed by plaintiff in rule. Agreed statement of facts filed and entire matter submitted.

[fol. 4] Shreveport, Louisiana,
Wednesday, March 10, 1943.

Court met pursuant to adjournment.

Their Honors, Judges McClendon, O'Neal and Mills, presiding.

The minutes of yesterday were read and approved in open Court.

86,893

Succn. of Sam Wiener, Jr.: For reasons orally assigned the plea of unconstitutionality was sustained. Judgment rendered in favor of plaintiff in rule fixing the amount of inheritance tax due the State of Louisiana, in the sum of $8,223.09. Judgment in accordance read, signed and filed.

Shreveport, Louisiana,
Saturday, March 13, 1943.

Court met pursuant to adjournment.

Their Honors, Judges Mills and O'Neal, presiding.

The minutes of yesterday were read and approved in open Court.

86,893

Succn. of Sam Wiener, Jr.: Motion made by J. Howell Flournoy, Tax Collector for orders of suspensive and devolutive appeal to the Supreme Court of Louisiana, only in so far as Movers' demand were rejected; appeal granted as asked for returnable on May 3, 1943, without bond.

[fol. 5] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

Succn. of Sam Wiener, Jr.

PETITION TO PROVE WILL—Filed February 23, 1943

To the Honorable the Judges of the First Judicial District Court of the State of Louisiana, in and for the Parish of Caddo:

The petition of Samuel G. Wiener, William B. Wiener, and Jacques L. Wiener, with respect represents:

1

That Sam Wiener, Jr., departed this life at his domicile in Caddo Parish, Louisiana, on December 10, 1942, as will appear from the affidavits annexed hereto.

2

That the Decedent left an olographic will, dated on the eighth day of April 1940, which your petitioners file herewith.

3

That under the terms of the attached will your petitioners are named as the sole legatees of the Decedent.

4

That Decedent's will does not provide for an executor, and that none is necessary, as the only debts left by the Succession were current debts which has been paid by your petitioners and taxes, the liability for which your petitioners hereby assume.

5

That decedent's parents predeceased him by many years, and the only children of the Decedent are your petitioners and Earl L. Wiener, who consents to the probate, registry and execution of the attached will as appears from the annexed affidavit.

[fol. 6] Wherefore petitioners pray that they be permitted to prove the will of Sam Wiener, Jr., deceased, at a time to be set by this honorable Court, and the said will be admitted to probate, registered and executed, and that your petitioners be recognized as the sole legatees of Sam Wiener, Jr., deceased, and after payment of the inheritance tax due to the State of Louisiana, in an amount to be hereinafter determined that your petitioners be placed in possession of the Succession of Sam Wiener, Jr.

Herold, Cousin and Herold, by S. L. Herold, Jr.,
Jacques L. Wiener, Attorneys for Petitioners.

* * * * * * *

Duly sworn to by Samuel G. Wiener, William B. Wiener and Jacques L. Wiener. Jurat omitted in printing.

[fol. 7] AFFIDAVIT OF EARL L. WIENER CONSENTING TO PROBATE

STATE OF LOUISIANA,
Parish of Caddo:

Before me, the undersigned authority, personally came and appeared Earl L. Wiener, who upon being duly sworn did depose and say that he consents to the probate of the will of Sam Wiener, Jr., and that he makes no claim to any interest in the Succession of Sam Wiener, Jr.

Thus sworn to and subscribed before me, Notary Public, at Shreveport, Louisiana, in the presence of the undersigned competent witnesses, on this the 22nd day of February, 1943.

Earl L. Wiener.

Witness: Adelene Bruce, Hester Rathfon.
J. W. Williams, Notary Public.

AFFIDAVIT OF J. W. WILLIAMS AND HERMAN L. HEROLD

STATE OF LOUISIANA,
Parish of Caddo:

Before me, the undersigned authority personally came and appeared J. W. Williams and Herman L. Herold, who upon being duly sworn did depose and say that they knew Sam Wiener, Jr., for many years, that the said Sam Wiener, Jr., departed this life at his domicile in Shreveport, Louisiana, on December 10, 1942, that the parents of the said Sam Wiener, Jr., had predeceased him, and that the only children of Sam Wiener, Jr. are Earl L. Wiener, Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, all residents of Caddo Parish, Louisiana.

Thus sworn to and subscribed before me, Notary Public, at Shreveport, Louisiana, in the presence of the undersigned competent witnesses, on this the 23d day of February, 1943.

[fol. 8] J. W. Williams, Herman L. Herold.

Witness: Adelene Bruce, Samuel L. Herold.
Hester A. Rathfon, Notary Public.

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA

ORDER DIRECTING PROOF OF WILL

Let the last will and testament of Sam Wiener, Jr. filed with the above petition be proved before me on the 24 day of February at 11 o'clock A. M. 1943, A. D.

Robt. J. O'Neal, District Judge.

Shreveport, La.

[fol. 9] IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

WILL OF SAM WIENER, JR.

I, Sam Wiener, Jr., being sound of mind and body make this, my last will and testament

I leave, will and bequeath unto my sons Jacques L. Wiener, William B. Wiener and Samuel G. Wiener, all of my property of any nature whatsoever, having heretofore given to my son Earl L. Wiener, property and money equal in value to a full one fourth of my estate—

Thus entirely written, dated and signed by me at Shreveport, Louisiana, on this 8th (eighth) day of April nineteen hundred and forty.

Sam Wiener, Jr.

Shreveport, Louisiana, April 8th, 1940.

Ne Varietur. Feby. 24, 1943. Robt. J. O'Neal, Judge.

[fol. 10] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

ORDER PROVING WILL OF SAM WIENER, JR.—Filed February 24, 1943

Be it known that on this date and pursuant to an order issued by me herein personally came and appeared before me, District Judge, Jeanette Williams and Adelene Bruce, competent witnesses and residents of Caddo Parish, Louisiana, who upon being duly sworn were by me presented with an instrument in writing purporting to be the last will and testament of the late Sam Wiener, Jr., which instrument

consists of one page, is dated the *eighth day of April, 1940,* begins with the following words: "I, Sam Wiener, Jr., being sound of mind and body, make this my last will and testament * * *" and ends as follows: "thus entirely written, dated and signed by me at Shreveport, Louisiana, on this 8th (eighth) day of April, Nineteen Hundred and Forty—Sam Wiener, Jr.".

The said appearers declared to me under oath that they are familiar with the hand-writing and signature of the Sam Wiener, Jr., deceased, and upon being presented with the instrument described above further declared that it is entirely written, dated and signed in the handwriting of Sam Wiener, Jr.

Whereupon I read the will, in an audible and distinct voice to the witnesses above named and the other persons present, namely, William C. Vaught and C. B. Williams and being satisfied that it was the last will and testament of Sam Wiener, Jr., para-phed the said instrument at the beginning and end thereof, and I do hereby declare the said will to be duly proved and order that it be deposited in the office of the Clerk of the First Judicial District Court of [fol. 11] Louisiana, and there recorded, and that the execution thereof take place according to law.

Thus done and signed in chambers, this 24 day of February, 1943, A. D.

Witness: Jeannette Williams, Adelene Bruce, C. B. Williams, Wm. C. Vaught.

Robt. J. O'Neal, District Judge.

[fol. 12] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

PETITION FOR RULE TO APPEAR FOR TAX ASSESSMENT—Filed February 24, 1943

The petition of Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, with respect represents:

1

That the will of Sam Wiener, Jr., deceased, has been duly probated, and that under the terms thereof your petitioners are the sole legatees.

That your petitioners owe an inheritance tax on the interest acquired by them under the terms of the will, and that it is necessary that the amount thereof be fixed contradictorily with the Tax Collector of Caddo Parish.

Wherefore your petitioners pray that a rule issue herein commanding J. Howell Flournoy, Sheriff and Ex Officio Tax Collector of Caddo Parish, Louisiana, to appear herein on a date to be fixed by this Court for the purpose of determining the amount of inheritance tax due to the State of Louisiana, and that after the tax has been duly determined and paid your petitioners be placed in possession of the Succession of Sam Wiener, Jr.

Herold, Cousin and Herold, by Sidney L. Herold, Jacques L. Wiener, Attorneys for Petitioners.

[fol. 13] *Duly sworn to by Jacques L. Wiener. Jurat omitted in printing.*

In the First Judicial District Court of Louisiana, Parish of Caddo

Order to Appear for Tax Assessment—February 24, 1943.

Let J. Howell Flournoy, Sheriff and Ex Officio Tax Collector of Caddo Parish, Louisiana, be, and he hereby is ordered to appear in this cause on the 3rd day of March, 1943 A. D. for the purpose of fixing the inheritance tax due to the State of Louisiana by the above named petitioners.

Shreveport, Louisiana, the 24th day of February, 1943.

Robt. J. O'Neal, District Judge.

Service accepted and citation waived.

Shreveport, Louisiana, the 24th day of February, 1943 A. D.

Harry V. Booth, Attorney for Tax Collector.

[fol. 14] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

ANSWER TO RULE—Filed March 2, 1943

Now into Court comes State of Louisiana, through J. Howell Flournoy, Sheriff and Ex Officio Tax Collector of Caddo Parish, Louisiana, and in answer to the rule filed herein with respect, avers:

1

Paragraph 1 is admitted.

2

In answer to Paragraph 2, your respondent avers that the plaintiffs, the heirs of Sam Wiener, Jr., owe an inheritance tax on the entire community estate rather than upon the one-half interest in the community inherited by them, and in this respect, your respondent further avers:

(a) That by virtue of Act No. 119 of the Legislature of Louisiana for the year 1932, the State of Louisiana is ultimately entitled to recover an inheritance tax against this estate which is equal to eighty per cent of the basic Federal tax as fixed by the Federal Revenue Act of 1926 (Chap. 27, Sec. 301A, 44 Statutes at Large 69, Title 26, Sec. 810, U. S. C. A.); and

(b) That Congress, in the Revenue Act of 1942, (Title IV, Sec. 402 A, 56 Statutes —, Title 26 Sec. 811, U. S. C. A.) provides that the basic Federal Estate Tax is computed upon the entire community and accordingly, the State of Louisiana is entitled to an amount equal to eighty per cent of the basic Federal Estate Tax so calculated.

Wherefore, your respondent prays that upon the determination of the net value of the entire community, that [fol. 15] there be judgment herein in favor of the State of Louisiana, and against petitioners, the heirs of Sam Wiener, Jr., for inheritance tax in a sum equal to eighty per cent

of the tax due the Federal Government under the Basic Federal Estates Tax.

Further prays for all necessary orders, general and equitable relief.

Harry V. Booth, Attorney for the Inheritance Tax Collector.

Duly sworn to by Harry V. Booth. Jurat omitted in printing.

[fol. 16] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH CADDO

PLEA OF UNCONSTITUTIONALITY—Filed March 2, 1943

1

In the above entitled and numbered cause, come now the movers Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, and specially plead that, notwithstanding anything to the contrary that may be contained in the Federal Revenue Act of 1942, approved on October 21, 1942, there may not be included in the estate of the decedent, subject to the Federal Estate Tax (and consequently subject to the provisions of the State Inheritance Tax under Act 119 of 1932) any property except that which was owned by the decedent at the instant of his death, and by his death transmitted to his heirs.

2

Insofar as the said Federal Statute may be construed as including in the estate of the decedent, for purposes of such tax, the entirety of the marital partnership of which decedent was a member, and in all the assets of which the decedent and his wife had, at the time of the former's death each a present and equal vested interest, they show that the provision of the Revenue Act of 1942 above referred to, is unconstitutional, null and void, because:

(a) Such provision is in contravention of and violative of Section 8 of Article I of the Constitution of the United States which requires that all duties, imposts and excises shall be uniform throughout the United States, inasmuch

as such statute does not seek to include in the estate of a deceased husband property of which his wife was presently vested prior to his death except in those states, such as [fol. 17] Louisiana, in which the community property system prevails.

(b) Such statutory provision is in contravention of and violative of the Fifth Amendment to the Constitution of the United States, in that its application would deprive these appearers of their property without due process of law by its imposition of taxes upon them, based both upon an arbitrary inclusion in the estate of the decedent of property which did not belong to him and upon the application thereto of graduated rates based upon values arrived at by reference to such other property.

Wherefore, they pray that such provision of said Act of Congress be decreed unconstitutional, null and void to the extent that it may seek to include in the estate of the decedent, Sam Wiener, Jr., property which at and before his death belonged to his wife as an equal partner with him in the marital community existing under the law of the State of Louisiana.

Jacques L. Wiener, Herold, Cousin & Herold, Attorneys for Movers.

I hereby certify that the above and foregoing plea of unconstitutionality is filed in good faith, and not for the purpose of delay.

March 2nd, 1943.

Sidney L. Herold, Of Counsel.

[fol. 18] [File endorsement omitted]

IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

AGREED STATEMENT OF FACTS—Filed March 2, 1943

Sam Wiener, Jr., died in the City of Shreveport on the 10th day of December 1942, leaving a last will and testament under which his entire estate was disposed of to his three children, who are movers in this rule. No legacies were made to collaterals, or strangers.

2

The decedent was married in Shreveport on the 12th day of February, 1907, to Florence Loeb, who survived him. All of the assets standing in the name of Sam Wiener, Jr., at the time of his death were acquired during the existence of the community between him and his surviving widow, and were owned by said community.

3

That net valuation of the entire community, after payment of debts, succession charges and taxes, State and Federal, as returned by the heirs, is *Six Hundred Eight Thousand Two Hundred Seventy Two Dollars and forty-six cents* ($608,272.46). This valuation, after investigation, has been found satisfactory by the State Collector of Inheritance Taxes, and is accepted as the correct and true valuation of the net entire community subject to the reservation contained in paragraph 6 of this agreed statement of facts.

4

Under Act No. 119 of 1932 of the Legislature of Louisiana, the State Inheritance Tax Collector claims that there is due to the State a tax equal to eighty per cent of the [fol. 19] amount of the Basic Federal Estate Tax, as fixed by the Federal Revenue Act of 1926, (44 Statutes at Large 69; Title 26, Sec. 410 U. S. Code). The heirs of the decedent do not contest their legal liability for eighty percent of such tax as may be lawfully due.

They contend that those taxes are to be computed upon the decedent's share in the community property only, to-wit: one-half of the above sum of Six Hundred Eight Thousand, Two Hundred Seventy Two Dollars and forty-six cents ($608,272.46) Dollars, which is Three Hundred Four Thousand, One Hundred Thirty Six Dollars Twenty Three Cents ($304,136.23).

That State Collector of Inheritance Taxes, however, claims that under §402 (b) (2) of the Revenue Act of 1942, the Basic Federal Estate Tax is computed upon the entire community and, consequently, that the State is entitled to an amount equal to eighty percent of the Federal Basic Estate Tax so calculated. The heirs contend that the provisions of the Federal Revenue Law of 1942, which provides for the inclusion in the estate of the decedent of

the entire community, is unconstitutional, and have filed formal pleading to that effect.

If the contention of the State Collector of Inheritance Taxes were sustained, then the amount of inheritance tax due by these movers, as heirs of the decedent, to the State Collector is $14,330.90.

If, on the other hand, the contention of the heirs the present movers, be sustained, then the amount of the inheritance tax due by them to the State is $8,224.09.

5

Inasmuch as there is no controversy between the parties in respect of the facts of the case, the matter is submitted to the District Court for adjudication as to the liability [fol. 20] of the heirs of the said decedent, and final judgment is to be herein rendered in favor of the State and against the said heirs for the amount ascertained by the Court to be due under these facts, and under the pleadings of the respective parties.

6

Inasmuch as the figures respecting valuation and indebtedness will be later checked by agents of the Federal Bureau of Internal Revenue, and inasmuch as said valuations may be later increased, or the deductible indebtedness diminished by the said Bureau, it is stipulated and agreed, anything to the contrary notwithstanding, that when and as final settlement shall have been made by the heirs of the decedent with the Federal Bureau of Internal Revenue, that the State of Louisiana shall have the benefit of such settlement; and that the said State Inheritance Tax Collector, or such official as may then have his present powers, may proceed by supplemental pleadings, or otherwise, for further and additional judgment based upon such increase in valuation and/or deduction and/or denial of deductible indebtedness.

In computing the net value of the estate, there has been deducted a sum representing a tentative computation of the Federal Estate Tax, which the heirs contend is to be deducted before calculating the State Inheritance Tax. The right is specifically reserved to the State Inheritance Tax Collector to contest this matter in subsequent proceedings.

Herold, Cousin & Herold, Jacques L. Wiener, Attorneys for Movers. Harry V. Booth, Attorney for State Inheritance Tax Collector.

[fol. 21] IN THE FIRST JUDICIAL DISTRICT COURT OF LOUISIANA, PARISH OF CADDO

JUDGMENT—Filed March 10, 1943

In this cause, by reason of the law and the evidence being in favor thereof, and for the reasons orally assigned.

It is Ordered, Adjudged and Decreed that the plea of unconstitutionality herein filed by the plaintiffs in rule be and the same is hereby sustained.

Accordingly, It is Further Ordered, Adjudged and Decreed that so much of the Federal Revenue Act of 1942, approved on October 21, 1942, as seeks to subject to the Federal Estate Tax, and consequently makes subject to the provisions of the State Inheritance Tax under Act 119 of 1932, and amendments thereof, the property of which the surviving wife of the decedent had a present and vested interest prior to his death, is violative of Section 8 of Article I of the Federal Constitution for want of uniformity throughout the United States, and is likewise violative of the Fifth Amendment to the Constitution of the United States in that its application here would deprive the heirs of the decedent of their property without due process of law.

It is, therefore, Further Ordered, Adjudged and Decreed that the Inheritance Tax due by the heirs and legatees of the decedent, who are plaintiffs in this rule, may be based only upon the one-half of the community which was owned by the decedent at and prior to his death, and by his last will and testament transmitted to said heirs.

It is accordingly Further Ordered, Adjudged and Decreed that there be judgment in favor of the State Collector of [fol. 22] Inheritance Taxes and against the plaintiff in rule, Samuel G. Wiener, William B. Wiener and Jacques L. Wiener, in the sum of Eighty Two Hundred Twenty Four Dollars and Nine Cents ($8224.09) as inheritance taxes due to the State of Louisiana; and that upon the payment of the said sum to the Sheriff of Caddo Parish and Ex-Officio Collector of State Inheritance Taxes, the said Samuel G. Wiener, William B. Wiener and Jacques L. Wiener be, as the universal legatees of Sam Wiener, Jr., deceased, sent into unconditional possession of his Succession.

It is Further Ordered, Adjudged and Decreed that there be reserved to the State Collector of Inheritance Taxes by

further and supplemental proceedings to avail himself of the reservation contained in the sixth paragraph of the agreed statement of facts herein filed.

Thus Done, Read and Signed in open Court on this the 10th day of March, 1943.

Robt. J. O'Neal, Judge, First Judicial District Court, Caddo Parish, Louisiana.

[fols. 23-24] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 25] IN THE SUPREME COURT OF LOUISIANA

Number 37089

Succession of Sam Wiener, Jr.

Appeal from the First Judicial District Court, Parish of Caddo, Honorable Robert J. O'Neal, Judge.

JOINT MOTION TO ADVANCE

In the above styled and numbered cause come now J. Howell Flournoy, Sheriff and Ex-Officio Collector of Inheritance Taxes for the State of Louisiana, the appellant, and also came and appeared Samuel G. Wiener, William B. Wiener and Jacques L. Weiner, the appellees, all represented by their respective counsel of record, and show:

1

That this appeal is from a judgment rendered upon a rule for the fixing of the amount of inheritance taxes due the State of Louisiana; that the issue on the trial of the said [fol. 26] rule is whether, under the provisions of Act 119 of 1932, the State Inheritance tax shall be based upon the entirety of the community existing, equally and jointly, between the decedent and his surviving spouse, or only upon the half of the community which was owned by the decedent, and which alone passed to the appellees by his death and by his last will and testament.

As appears from the transcript in this cause, this issue, in turn, depends upon the constitutionality of the Federal Revenue Act of 1942; and that the District Court sustained the contention of the appellees that so much of the said

Federal Revenue Act as seeks to include in the taxable estate of the decedent the entirely of the property owned prior to his death equally and jointly by him and his wife as partners in community, is unconstitutional and, therefore, that under the said Act of 1932, the State Inheritance tax is measured only by the property actually owned by the decedent.

Your appearers, therefore, show that this cause presents a case for special preference for these reasons:

(a) That it is a proceeding for putting heirs into possession of an estate;

(b) That it is a suit involving the constitutionality of a tax;

(c) That it is a suit wherein the collection of a tax is delayed, and the public interest and public fisc involved.

[fol. 27] 2

That under Section 2 of Rule IX of the rules of this Honorable Court, this case is, therefore, entitled to be assigned for argument by special preference in preference to cases previously docketed.

Wherefore, both appellant and appellees jointly move and pray this Honorable Court for an order directing that this case be fixed summarily, and by special preference, on the earliest available date, and be granted preference over cases already assigned for argument on such date.

(Signed) Harry V. Booth, Attorney for the Tax Collector, Appellant. (Signed) Harold, Cousin & Herold, Attorneys for Plaintiffs in rule, Appellees.

Duly sworn to by Harry V. Booth and Sidney L. Herold. Jurat omitted in printing.

[fol. 28] IN SUPREME COURT OF LOUISIANA

ORDER SETTING CASE—March 20, 1943

Considering the foregoing joint motion,

It is now ordered that this cause be assigned for argument, summarily and by special preference, for Monday, the 17th day of May 1943, and that it be placed by the Clerk

upon the argument docket for said date in preference of cases previously assigned for such date.

Thus done and signed officially, at New Orleans, on this 20th day of March, 1943.

(Signed) Charles A. O'Niell Chief Justice.

[fol. 29] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

JOINT MOTION TO NOTIFY ATTORNEY GENERAL OF THE UNITED STATES AND ORDER THEREON—March 20, 1943

In the above styled and numbered cause, come now Harry V. Booth, counsel of record for the Tax Collector, the appellant herein, and also came Jacques L. Wiener and Sidney L. Herold, counsel of record for the plaintiffs in rule, the universal legatees of Sam Wiener, Jr., deceased, and jointly represent:

1

That the issues in this cause depend upon the constitutionality of a provision of a Federal statute, to-wit, the Federal Revenue Act of 1942, approved October 21, 1942.

2

That, while the United States is not a party to this proceeding, and while there is no statute so directing, yet counsel respectfully suggest to this Honorable Court the pro-
[fol. 30] priety of an order herein, directing the Clerk of this Court to notify the Attorney General of the United States that this case is pending, and that it has been assigned for argument for a particular date, and that this Court would entertain appearance by the Attorney General of the United States, or other counsel designated by him, as *amicus curiae*, should he see fit so to appear.

Wherefore, they respectfully move and pray the Court for such order.

(Signed) Harry V. Booth Attorney for the Tax Collector. (Signed) Jacques L. Wiener. (Signed) Herold, Cousin & Herold, Attorneys for Plaintiffs in rule.

ORDER

On joint motion of Harry V. Booth, counsel of record for the Inheritance Tax Collector, Appellant, and of Jacques L. Wiener and Sidney L. Herold, counsel of record for the universal legatees of Sam Wiener, Jr. deceased, It Is Now Ordered:

That the Clerk of this Court do notify by letter the Attorney General of the United States that there is pending in [fol. 31] this Court this cause, Number 37089 of its docket, in which is involved the constitutionality of a portion of an Act of the Congress of the United States, and that the said Attorney General is invited, if he see fit, to appear herein as *amicus curiae*, either personally or through such counsel as he may designate at the hearing of this cause, now set by preference for the 17th day of May, 1943.

By the Court, New Orleans, Louisiana, March 20, 1943.

(Signed) Charles A. O'Niell Chief Justice.

[fol. 32] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

AMENDED PLEA OF UNCONSTITUTIONALITY

To the Honorable, the Supreme Court of Louisiana:

In the above styled and numbered cause now come the appellees, plaintiffs below on the rule directed to the State Inheritance Tax Collector of Caddo Parish, Louisiana, and respectfully show:

1

That as specially pleaded, and as held by the District Court, the issue in this cause is the constitutionality of Section 402 (b)(2) of the Federal Revenue Act of 1942, approved October 21, 1942. That Statute, insofar as it seeks to impose estate taxes in the case of the death of a partner in community measured by and based upon the entire community instead of upon the interest only of the deceased, is violative of the Fifth Amendment to the Fed- [fol. 33] eral Constitution, and likewise of the uniformity clause of Section 8 of Article I of the Constitution of the United States.

2

By brief and by oral argument, the Attorney General of the United has injected into this cause for the first time the contention that

> "the tax liability here in issue is only that imposed by the State Statute",

and, accordingly, he argues that the issue here is the constitutionality of State, and not Federal, action.

Without in any manner conceding the correctness of that position, but on the contrary expressly reaffirming that this cause involves and depends upon the constitutionality of the Federal Statute, these appellees now plead in the alternative that if it is the State Statute, or State action whose constitutionality must be determined, then that in the construction of the State Statute, either alone or in conjunction with the Federal Statute, or any action by the State taxing authorities, or any other State authorities, which would impose an inheritance tax upon the death of Sam Wiener, Jr., the father of these appellees, based or measured upon the value of the entire community existing betwen the said Sam Wiener, Jr. and his surviving widow, Florence Loeb Wiener, would be in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 34] Wherefore, they reiterate their prayer for an affirmance of the decree appealed from.

(Signed) Jacques L. Wiener, Herold, Cousin & Herold, Attorneys for Appellees.

I certify that the foregoing plea is filed in good faith, and not for the purpose of delay.

Shreveport, Louisiana, May 21st, 1943.

(Signed) Sidney L. Herold, Of Counsel for Appellees.

Service of the above and foregoing alternative plea of unconstitutionality is acknowledged; and considering the fact that the same is filed in reply to argument advanced by the Attorney General of the United States for the first time on the argument of this cause, there is of course no objection on our part to its consideration and disposition by the Honorable the Supreme Court of Louisiana.

(Signed) Harry V. Booth, L. L. Lockard, Attorneys for the Tax Collector of Caddo Parish, Louisiana.

[fol. 35] IN THE SUPREME COURT OF LOUISIANA

Succession of SAM WIENER, JR.

Appeal from the First Judicial District Court for the Parish of Caddo; Hon. Robert J. O'Neal, Judge

Rogers, J., Absent

OPINION—June 21, 1943

FOURNET, Justice:

Samuel G., William B., and Jacques L. Wiener, the universal legatees and heirs of the late Sam Wiener, Jr., proceeding under Act No. 127 of the Extra Session of 1921, as amended by Act No. 44 of 1922, ruled the sheriff and ex-officio tax collector for the parish of Caddo to fix the amount of inheritance tax due the state of Louisiana on the property bequeathed to them by their father under the terms of his will, being the undivided half interest in the property acquired during the community of acquets and gains that existed between him and their mother, who survives the decedent and owns the other undivided half of the estate.

Answering this rule, the tax collector averred the heirs owed "an inheritance tax on the *entire* community estate rather than upon the one-half interest in the community in-[fol. 36] herited by them," for in Section 402(b) (2) of the Revenue Act of 1942, (26 U. S. C. A. 811 e-2) Congress has included the entire community in which a decedent had an interest at the time of his death in his taxable estate and the Louisiana Legislature, in Section 2 of Act No. 119 of 1932, provided that the estate tax to be levied in this state shall be at least 80% of the estate tax payable to the United States. (Italics ours.)

The plaintiffs in the rule then interposed a plea challenging the constitutionality of this act of Congress, as being in contravention of Section 8 of Article I of the Constitution of the United States and of the 5th amendment thereto.

The district judge, after the case was tried on an agreed statement of facts, sustained the plea of unconstitutionality on both counts, decreeing the inheritance tax due the state of Louisiana by the plaintiffs in the rule to be $8,224.09, based on the property bequeathed them by their father, that is, on his half of the community property.

The tax collector appealed from this judgment, and the United States, filing a brief Amicus Curias through the office of its Attorney General joined the appellant in upholding the constitutionality of Section 402(b) (2) of the Revenue Act of 1942, in the event this court concludes, contrary to the government's contention, the constitutionality thereof must be passed on.

There is no controversy between the parties with respect to the facts of the case. Sam Wiener, Jr., died in the city of Shreveport, Louisiana, on December 10, 1942, leaving a last [fol. 37] will and testament under which his entire estate was bequeathed to his three children, the plaintiffs in this rule. All of the property and assets standing in the name of the decedent at the time of his death were acquired by and belonged to the community that had existed between him and his surviving widow, Florence Loeb, to whom he was married on February 12, 1907, the appraised value of which, after deduction and payment of debts, succession charges, and taxes is $608,272.46. It is agreed between the plaintiffs in the rule and the respondent tax collector that if the tax is to be computed on the property received by the heirs as the legatees of their father; that is, on $304,136.23, his half of the community property, the amount of the inheritance tax due the state is $8,224.09, but that if it is to be computed on the entire community, as the tax collector contends, the inheritance tax due by them is $14,330.90.

In the year 1932, the Louisiana legislature, to obtain the benefit of the provisions contained in Section 301 (b) of the Revenue Act of 1926 making it mandatory that a credit of 80% be allowed against the inheritance tax due the federal government for inheritance estate, and succession taxes paid the states with respect to property included in the gross estate, adopted its Act No. 119 providing: "Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty per cent (80%) of the estate tax payable to the United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty per cent (80%) shall be paid to the State of Louisiana."

[fol. 38] Under the express provisions of Act No. 127 of the Extra Session of 1921, as amended by Act No. 44 of 1922, the heirs or legatees of a deceased person are required

to have the inheritance tax fixed within six months after the death of the party in whose estate they are benefiting, a fee equivalent to 1% per month being charged if such payment is made after the six months period, increased to 2% per month after 12 months.. They cannot be placed in possession of the property so inherited until such tax has been paid.

Now, because of the Congressional adoption of Section 402(b) (2) of the Revenue Act, amending Section 811(e) of the Revenue Code of 1939 (26 U. S. C. A. 811(e), the tax collector of Caddo parish is contending inheritance and estate taxes in this state, under Act No. 119 of 1932, must be computed on the basis established in that section, that is, that the value of the gross estate of the decedent to be taxes must be determined by including therein "the value at the time of his death of all property", such gross estate where community interests are involved consisting of "The extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State * * * except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition." Section 402(b) (2) of the Revenue Act of 1942; 26 U. S. C. A. 811(e) (2).

Under the express provisions of the Louisiana Revised Civil Code, "Every marriage contracted in this State, [fol. 39] superinduces of right partnership or community of acquets or gains" (Article 2399), and "*This partnership* or community *consists* of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, *of the product of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage*, either by donations made jointly to them both, or by purchase, or in any other similar way, *even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.*" *Article 2402.* (Italics ours.)

That this community is a partnership in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired, is well settled in this state (Dixon v. Dixon's Executors, 4 La. 188; Theall v. Theall, 7 La. 226; Succession of Marshal, 118 La. 212, 42 So. 778; Succession of May, 120 La. 692, 45 So. 551; Beck v. Natalie Oil Co., 143 La. 154, 78 So. 430; Ramsey v. Beck, 151 La. 190, 91 So. 674, Phillips v. Phillips, 160 La. 813, 107 So. 584; Pfaff v. Bender, 38 F. (2d) 642; and Bender v. Pfaff, 282 U. S. 127, 75 L. Ed. 252) and the federal government, in levying inheritance or estate taxes, has consistently recognized that the law of the state is determinative of the interest left by the decedent. Liebman v. Fontenot, 275 Fe. 688; Warburton v. White, 176 U. S. 484, 44 L. Ed. 555; Arnett v. Reade, 220 U. S. 311, 55 L. Ed. 477; and 32 Opinions Attorney General 435.

It is our opinion, therefore, that the construction sought to be placed on Act No. 119 of 1932 by the tax collector—that is, that in arriving at the amount of inheritance taxes [fol. 40] due by the plaintiffs in this rule on the property bequeathed to them by their father, there must be included in his gross estate not only the half interest in the community owned by him and willed to them, but also the half of the community belonging to their mother, who survives—would render it violative of the due process guaranteed by the 14th amendment to the Constitution of the United States, since such interpretation would result in the imposition of a tax upon those succeeding to the estate of a decedent measured in part by the property comprising the estate of another, to which the estate of the decedent is in no way related.

In the case of Hoeper v. Tax Commission, 284 U. S. 206, 76 La. Ed. 248, the Supreme Court of the United States, in reversing a decision of the highest court in Wisconsin maintaining the validity of a statute of that state requiring the husband and wife to file joint income tax returns and levying a tax on a graduated scale on the combined total of the two incomes, pointed out that the question presented was whether a state has the power to measure the income tax owed by the husband on an income that was, in part, that of his wife, and concluded that "*because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another*

is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxapayer's income cannot be made such by calling it income." See, also, Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, 20 S. Ct. 747. (Italics ours.)

The limitation placed upon the states by the 14th amendment is likewise placed on the federal government under the 5th amendment.

In the case of Nichols v. Coolidge, 274 U. S. 531, 71 L. Ed. 1184, 52 A. L. R. 1081, 47 S. Ct. 710, the Supreme Court of the United States expressly recognized that the congres- [fol. 41] sional power to levy an inheritance tax is subject to the restrictions and limitation found in the 5th amendment, holding that so much of Section 402(c) of the Revenue Act of 1919 requiring the value of property donated by a decedent prior to the passage of such act should be included in computing the gross estate on which the inheritance or estate tax was to be levied, amounted to a taking of property without due process of law, in violation of the 5th amendment, saying:

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th amendment. Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. Ed. 493, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B 713; Barclay & Co. v. Edwards, 267 U. S. 442, 69 L. Ed. 703, 45 Sup. Ct. Rep. 348. See also Knowlton v. Moore, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747. And we must conclude that Section 402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

This section of the Revenue Act of 1919 (402-c) was amended in 1926 (302-c) to provide that transfers of property made within two years prior to the death of a person should be calculated in computing his estate for the purpose of levying an inheritance tax thereon, as having been made in contemplation of death, and the Supreme Court, again passing on the constitutionality of the statute, answering affirmatively the question certified to it by the Circuit Court

of Appeals for the Third Circuit of whether or not the sen-
[fol. 42] tence in this section reading: "Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title," constituted a violation of the due process clause of the 5th Amendment to the Constitution of the United States, had this to say:

"In substance and effect, the situation presented in the Hoeper Case is the same as that presented here. In the first place, *the tax, in part, is laid in respect of property shown not to have been transferred in contemplation of death and the complete title to which had passed to the donee during the lifetime of the donors;* and secondly, the tax is not laid upon the transfer of the gift or in respect to its value. It is laid upon the transfer, and calculated upon the value, of the estate of the decedent, such value being enhanced by the fictitious inclusion of the gift, and the estate made liable for a tax computed upon that value. * * * *The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the state derives no benefit of any description.* Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as
[fol. 43] arbitrary and a denial of due process of law. *Such an exaction is not taxation but spoilation.* 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' United States v. Baltimore & O. R. Co. 17 Wall. 322, 326, 21 L. Ed. 597, 599." Hiener v. Donnan, 285 U. S. 312, 76 L. Ed. 772. (Italics ours.)

It is obvious, therefore, that the interpretation sought here with respect to Section 402(b) (2) of the Revenue Act of 1942, is to the same effect as that sought with reference to Act No. 119 of 1932, that is, the inclusion in the taxable estate of the decedent Wiener his wife's property, in violation of the 5th Amendment to the Constitution of the United States.

The conclusion we have reached in this case is in keeping with the decision of the United States Supreme Court in the case of Bender v. Pfaff, supra, where that court recognized that under the law of Louisiana the wife is not only vested with the ownership of half of the community property from the moment it is acquired, but is likewise the owner of half of the community income. It necessarily follows that the wife's share of this income was utilized in acquiring the property found in the community estate that existed between her and her deceased husband.

In fact, counsel for the tax collector concede in their brief that if the Pfaff case "stood alone in the jurisprudence, undoubtedly the position of the succession here would be correct, but there are other cases pointing to a contrary result in so far as the Federal Estate law is [fol. 44] concerned," citing the cases of Tyler v. United States, 281 U. S. 497, 74 L. Ed. 991, and United States v. Jacobs, 306 U. S. 363, 83 L. Ed. 763.

A study and analysis of these two cases, in our opinion, conclusively demonstrates that they are neither controlling of the issue presented in this case, nor apposite.

In the Tyler case, the Commissioner of Internal Revenue included in Tyler's gross estate certain property held by him and his wife under a tenancy by the entirety in Maryland and Pennsylvania, that is, (1) corporate shares that, at the time of the conveyance creating the tenancy by the entirety with respect thereto, were owned solely by the decedent; (2) ground rent and real estate purchased with the separate funds of the husband though conveyed to both of them as tenants by the entirety; and (3) real estate owned by the decedent at the time it was conveyed to a third person and reconveyed to the decedent and his wife as tenants by the entirety. The question was whether or not the inclusion of this property in the gross estate of the decedent for the purpose of computing the tax upon the transfer of the net estate under Section 202 (c) of the Revenue Acts of 1916 and 1921 contravened the 5th Amend-

ment to the Constitution of the United States. The court found that none of the property constituting the tenancy thus created had, prior thereto, ever belonged to the surviving spouse, and that although, under the law of Maryland and Pennsylvania, no interest in the property held by tenants by the entirety passed to the surviving spouse upon the death of one of them, the whole continuing in the survivor, such law was based upon the amiable fiction of the common law that the husband and wife are but one person—constitute one unit—and that the wife, while entitled to the joint use and possession of the property during the lifetime of [fol. 45] her husband, was without right to dispose of any part thereof by will or pass it to her legal heirs, concluding that: "*These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax,*" and pointing out that "The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end." (Italics ours.)

In the Jacobs case, which arose in Illinois, the payment of an estate tax was sought to be evaded by the creation of a joint tenancy, a fiction similar to that of the tenancy by the entirety in the Tyler case, and the question was whether or not "the entire value or only one-half of the value of real property—purchased by a decedent with his own funds and held at his death by his wife and himself under a joint tenancy set up prior to 1916—may be included in the gross estate under the 1924 Revenue Act." There the court, relying on the decision in the Tyler case, concluded that "A tenancy by the entirety 'is essentially a *joint tenancy*, modified by the common law theory that husband and wife are one person,'" and that, as in a tenancy by the entirety, the wife could not dispose of her interest therein by will or pass it to her legal heirs at her death. The court specifically pointed out that the decedent paid the entire purchase price for the property held in the

joint tenancy with his separate funds and that it was clearly [fol. 46] the intention of Congress "to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety * * * in so far as the property or consideration therefor is traceable to the decedent." (Italics ours.)

Thus it may be seen that the pivotal points upon which the decisions in these two cases turned were that the wife contributed nothing, either in money or property, toward the creation of the joint tenancy or tenancy by the entirety, and that she was powerless to dispose of any interest in such estate by will or through legal heirship.

In Louisiana, the situation is entirely different, for here the civil law prevails, and the theory of the civil law is that the acquisition of all property during the marriage is due to the joint or common efforts, labor, industry, economy, and sacrifices of the husband and wife; in her station the wife is just as much an agency in acquiring this property as is her husband. In Louisiana, therefore, the wife's rights in and to the community property do not rest upon the mere gratuity of her husband; they are just as great as his and are entitled to equal dignity. Unlike the wife's interest in the common law states where joint tenancies and tenancies by the entirety abide, the wife's interest in the community property in Louisiana is more than a mere expectancy or hope and her husband's death is not the force that generates her title thereto and her rights therein. Over a hundred years ago, in the case of Dixon v. Dixon's Executors, 4 La. 188, this court held that the rights of the wife, as well as those of the husband, in and to the marital gains, grow out of the marriage contract itself and do not originate only when it is dissolved, [fol. 47] and this is now our settled law, as was pointed out in the case of Phillips v. Phillips, 160 La. 813, 107 So. 584. She is the half-partner and owner of all acquisitions made during the existence of the community, *whether they be property or income*. She has the same privilege as her husband of disposing of her interest therein by will, and, in the absence of a will, at her death her interest in the community property passes to her legal heirs in the same manner as her husband's interest therein passes to his legal heirs in the absence of a will.

It is true that in weaving this harmonious commercial partnership around the intimate and sacred marital rela-

tionship, the framers of our law and its codifiers saw fit, in their wisdom, to place the husband at the head of the partnership, but this did not in any way affect the status of the property or the wife's ownership of her half thereof. As expressed in Poe v. Seaborn, 282 U. S. 101, 76 L. Ed. 239, "The law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner." The community partnership had to be placed in charge of a managing partner for very expedicious and necessary reasons,—dealings with third parties with respect to the community property had to be protected from the nullifying actions of the other spouse; the confusion ensuing from dual control had to be avoided. And the husband was made the managing partner of the community and charged with the administration of its effects, as well as with the alienation of its effects and revenues by onerous title, because he was deemed the best qualified to act.

But the redactors of our law did not neglect to hedge the wife's interest in the community property with protecting rights. They subjected the husband's powers to vari- [fol. 48] ous substantial checks and limitations corresponding to those imposed upon any managing partner or agent and provided for the wife a right to assert such limitations. He is, by statute, expressly prohibited from donating the community real estate or the whole or a portion of the movables, and he may not dispose of the community income in any manner by fraud to injure the wife. No portion of the community income can be used to improve his separate estate or to pay his separate debts. The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her half of the community property whenever her husband proves to be incompetent, a bad manager, of a reckless or speculative disposition, or whenever his affairs are in such disorder that her property rights are jeopardized. Upon the institution of such a suit, she may, by injunction, restrain her husband from disposing of any portion of the community property and she may likewise enjoin his disposition of any part of the community partnership property when, even though he is a good business manager, she provokes a dissolution and liquidation of the community

through divorce proceedings because he is otherwise an unfaithful partner. In the event of a divorce, the wife is entitled absolutely and of right to an exact one-half of the community property and the court has no discretion or power to award her less. This is true even though the husband himself provokes the divorce because the wife has been guilty of the very serious misconduct of adultery. The wife's right to dispose of her interest in the community property by will is absolutely unrestricted; and even though she wills it to her paramour, her husband has no right to [fol. 49] complain. If the wife does not make a will, her children take her share of the community property to the exclusion of the husband; and this is so even though the children are the wife's illegitimate children by another man. In the event the wife dies leaving neither a father nor mother nor decedents, the husband, under the express provisions of Article 915 of the Revised Civil Code, inherits her share of the community property, provided there is not will, and in such case the state of Louisiana, as well as the United States, assesses an estate tax on the property so inherited. The same is true when the wife wills her half of the community to her husband.

It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of her husband but, instead, from an express legal contract of partnership entered into at the time of the marriage. There is no substantial difference between her interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. The only real difference is that the limitations placed on the managing partner in the community partnership are fixed by law, while those placed on the managing partner in an ordinary or limited partnership are fixed by convention or contract. And yet, we are asked to place an interpretation on Act No. 119 of 1926 and Section 402(b)(2) of the Revenue Act of 1942 that would result in the inclusion in the estate of the managing partner of an interest in the community partnership to which he never had any claim and which was, in fact, during his lifetime and is now, owned by his wife.

[fol. 50] It is our conclusion, therefore, that the trial judge, in fixing the estate taxes due by the plaintiffs in

the rule on the property willed to them by their late father, Sam Wiener, Jr., properly excluded from the mass of the estate their mother's half of the community property.

For the reasons assigned, the judgment of the lower court is affirmed.

[fol. 51] IN SUPREME COURT OF LOUISIANA

[Title omitted]

MOTION FOR REHEARING

Now into Court, through undersigned counsel, comes J. Howell Flournoy, Sheriff and Ex-Officio Inheritance Tax Collector for the State of Louisiana, and with respect, shows:

1

That the judgment of this Honorable Court declaring the Act unconstitutional is erroneous, and that a rehearing should be granted herein.

Wherefore, your mover prays that a rehearing be granted herein, and after due proceedings had, that there be judgment herein as prayed for by him.

Further prays for all necessary orders, general and equitable relief.

(Signed) Harry V. Booth, Attorney for Tax Collector.

I hereby certify that the foregoing motion is filed in good faith and not for purposes of delay and that a copy hereof has been forwarded to opposing counsel, this the 28 day of June, 1943.

(Signed) Harry V. Booth, Attorney for Tax Collector.

[fol. 52] IN THE SUPREME COURT OF LOUISIANA

ORDER DENYING MOTION FOR REHEARING—July 13, 1943

Court was duly opened, pursuant to adjournment. Present, Their Honors: Charles A. O'Niell, Chief Justice, and Wynne G. Rogers, Fred M. Odom, Archibald T. Hig-

gins, John B. Fournet, Amos Lee Ponder and Joe B. Hamiter, Associate Justices.

* * * * * * *

Rehearings were refused in the following cases:

* * * * * * *

37,089. Succession of Wiener.

Clerk's Certificate to foregoing order omitted in printing.

[fol. 53] IN SUPREME COURT OF LOUISIANA

[Title omitted]

PETITION FOR APPEAL

Now comes J. Howell Flournoy, Sheriff and Ex-Officio Tax Collector, Caddo Parish, Louisiana, plaintiff and appellant herein and shows:

1

That he considers himself aggrieved by the final decision of the Supreme Court of Louisiana in the above numbered and entitled cause and desires and is entitled to an appeal to the Supreme Court of the United States.

2

That he annexes hereto his Assignment of Errors and files simultaneously his separate typewritten statement as to jurisdiction.

Wherefore, petitioner prays that he be allowed an appeal in this cause from the final judgment herein to the Supreme Court of the United States;

Further prays for all necessary orders, general and equitable relief.

Booth & Lockard, (Signed) by Harry V. Booth.

Duly sworn to by Harry V. Booth. Jurat omitted in printing.

[fol. 54] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the appellant J. Howell Flournoy, Sheriff and Ex-Officio Tax Collector for Caddo Parish, and files herewith his petition for an appeal; and in connection therewith the appellant says there are errors in the record and proceedings of the above entitled cause; and for the purpose of having the same reviewed in the Supreme Court of the United States, he files the following assignment of errors:

1

The Supreme Court of Louisiana erred in holding that Section 402 (b)(2) of the Federal Revenue Act of 1942 is unconstitutional as violative of the Fifth Amendment to the Constitution of the United States.

2

The Supreme Court of Louisiana erred in denying legal efficacy to the provisions of Section 402 (b)(2) of the Fed-
[fol. 55] eral Revenue Act of 1942 as requiring the valuation of all of the community property standing in the name of the decedent, Sam Wiener, Jr. in the computation of the Federal basic estate tax; and, consequently, in the computation of the inheritance tax due to the State of Louisiana which, under the statute of the state, is required to be eighty percent of the amount of the Federal basic estate tax.

3

The Supreme Court of Louisiana erred in affirming the judgment of the First Judicial District Court of Louisiana which had held that provisions of Section 402 (b)(2) of the Federal Revenue Act of 1942 are unconstitutional as violative, both of the Fifth Amendment and of Section 8, of Article 1 of the Constitution of the United States.

Wherefore this appellant prays that the aforesaid judgment of the Supreme Court of Louisiana be reversed.

(Signed) Booth & Lockard, Eugene Stanley, Attorneys for Appellant.

[fol. 56] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

ORDER ALLOWING APPEAL—July 17, 1943

On this the 17th day of July, 1943, on reading the petition of J. Howell Flournoy, Sheriff and Ex-Officio Tax Collector for Caddo Parish, the appellant herein, praying for the issuance of an order herein allowing his appeal to the Supreme Court of the United States from the Supreme Court of the State of Louisiana, and it appearing from said petition and the record in the above entitled cause that there was drawn in question the validity of Section 402 (b)(2) of the Federal Revenue Act of 1942, approved October 21, 1942, on the ground that said statute deprives the appellees of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States, and that the decision of this Court was against the validity of said statute and that, consequently, such petition is the proper petition for the issuance of this order.

Now, Therefore, It Is Ordered by the undersigned, the Chief Justice of the Supreme Court of the State of Louisiana, that said appeal be and the same is hereby allowed;

It Is Further Ordered that said appeal be allowed upon [fol. 57] bond being furnished as security for costs in the sum of $250.00; and,

It Is Further Ordered that the Clerk of this Court, within forty days from this date, make and transfer to the Clerk of the United States Supreme Court under his hand and the seal of this Court a transcript of the record herein containing a full, true and complete transcript of the record herein.

Thus Done and Signed at New Orleans, Louisiana, on this the 17th day of July, 1943.

(Signed) Charles A. O'Niell, Chief Justice of the Supreme Court of the State of Louisiana.

[fols. 58-82] Citation in usual form showing service on Sidney L. Herold, omitted in printing.

[fols. 83-86] Bond on Appeal for $250.00 Approved July 19, 1943, omitted in printing.

[fol. 87] IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

PRAECIPE FOR RECORD

The Clerk of the Supreme Court of Louisiana will please include in the transcript of appeal to the Supreme Court of the United States the entire record on file with him, together with the following:

(1) Petition for appeal filed by the appellant;
(2) Assignment of errors;
(3) Order allowing appeal;
(4) Appeal bond and approval;
(5) Citation of appeal and acknowledgment of service;
(6) Order of filing of jurisdictional statement and proof of service; and,
(7) This praecipe.

(Signed) Eugene Stanley, Booth & Lockard, Attorneys for Appellant.

Service of the above and foregoing praecipe acknowledged and no counter praecipe to be filed.
July 19, 1943.
(Signed): Herold, Cousin & Herold, Attorneys for Appellees.

[fol. 88] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 89] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed August 19, 1943

To the Honorable, the Supreme Court of the United States:

Conformably to § 9 of Rule 13, the Appellant herewith files with the Clerk his statement of the points on which he intends to rely, and designation of the portions of the record he thinks necessary for the consideration thereof, to-wit:

1. Appellant states that the only issue before the Court.
[fol. 90] and the point on which he intends to rely is that the

Act of Congress held by the Supreme Court of Louisiana to be unconstitutional, to-wit,

> Section 402 (b) (2) of the Revenue Act of 1942, approved October 21, 1942,

is constitutional, and that the Supreme Court of Louisiana erred in holding said statute to be violative of the Fifth Amendment to the Federal Constitution.

2. In the opinion of Appellant, it is necessary for the consideration of the above named point that the entire record be considered; and he, therefore, designates the entire typewritten record, as transmitted to this Court from the Supreme Court of Louisiana.

Eugene Stanley, Attorney General of the State of Louisiana. Booth & Lockard, Attorneys for Appellant.

I hereby acknowledge service on this the 16th day of August, 1943, of the above statement of points on which Appellant intends to rely, and his designation of the portions of the record which he thinks necessary for the consideration thereof.

Counsel for Appellees also considers the entire typewritten record necessary for the consideration of the constitutional issue involved on appeal.

Sidney L. Herold, Attorney for Appellees.

[fol. 91] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION.—October 11, 1943

The statement of jurisdiction is in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing on the merits.

Endorsed on cover: Enter Eugene Stanley. File No. 47,745. Louisiana, Supreme Court. Term No. 252. J. Howell Flournoy, Sheriff and Ex-Officio Tax Collector, Appellant, vs. Samuel G. Wiener, William B. Wiener and Jacques L. Wiener. Filed August 9, 1943. Term No. 252, O. T., 1943.